Supreme Court of the United States

OCTOBER TERM 1949, No. 708

IB CHR SONNESEN,

Petitioner,

against

PANAMA TRANSPORT COMPANY,

Respondent.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae.*

FRIENDS OF
ANDREW FURUSETH
LEGISLATIVE ASSOCIATION.

SILAS B. AXTELL.

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BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae.*

Being a Proctor in Admiralty of the U. S. District Court for the Southern District of New York, Director of the Friends of Andrew Furuseth Legislative Association, and counsel for a number of seamen similarly placed as the petitioner herein, having the consent of petitioner's counsel to file this brief but having been denied permission by respondent, I respectfully petition this Court for permission to file the annexed brief *amicus curiae.*

The Friends of Andrew Furuseth Legislative Association was organized on March 12, 1939, the 85th Birthday, but one year after the death, of Andrew Furuseth, the creator of the La Follette Seamen's Act March 4, 1915 (Cong. Record, Debate and Proceedings, U. S. Senate, Oct. 2, 7, 9, 16, 18, 20, 21, 22, 23, 28 1913). Hon. William Denman, U. S. C. A. 9th Dist., San Francisco, Calif., who was counsel to Woodrow Wilson at the signing of the Seamen's Act on March 4, 1915 (See symposium on Life and Work of Andrew Furuseth, Darwin Press, New Bedford, Mass.,

pages 16, 224) is an honorary Trustee of this association, the stated purpose of which is to protect seamen and assist in the passage and enforcement of the legislative policies of Andrew Furuseth, sometimes known as the Abraham Lincoln of the Sea.

The respondent has opposed this petition for certiorari on the ground that the judgment of the Court of Appeals is not final. I have read the petitioner's brief, the respondent's brief in opposition and the reply brief which, I am informed, the petitioner will file, and I am satisfied that this Court has a broad and sound discretion to review the application of this statute of the United States, which is final, as to the determination of the petitioner's rights. Having been identified with Andrew Furuseth as adviser on the La Follette Seamen's Act, its preparation and amendments, before Congress from 1908 until it was signed on March 4, 1915; having been counsel in a case which this Court declared ineffectual, in our effort to do away with the Fellow Servants Rule as to Section 20 of said Act (*Chelentis* v. *Luckenbach,* 247 U. S. 372); having been counsel with Justice Sutherland, then an ex-Senator from the State of Utah, in the drafting of the Jones Act; and having been counsel for and having briefed the case in which this Court construed the Jones Act, harmonizing it as part of the general maritime law of the United States (*Johnson* v. *Panama,* 264 U. S. 375); I feel that it is my duty, so far as I can, to describe the conditions as they existed before 1915 on the high seas, and the purposes which the framers of the La Follette Seamen's Act and its amendments had in mind.

POINT I

The public interest requires a decision by this court on the question of the applicability of the United States Maritime Law as to foreign vessels engaged in competition with vessels of the United States.

The Jones Act of June 5, 1920, Section 688, U. S. C. A. amendment of the Act of March 4, 1915, made the Railway Servants' Act, Section 8657—Act of April 22, 1907, Chapter 149, Section 51, applicable to seamen by reference. The act,

> "688. Recovery for injury to or death of seamen. Any seaman who shall suffer personal injury in the course of his employment, may at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, and in cases of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides, or in which his principal office is located."

Section 20 of the La Follette Seamen's Act of which it was an amendment, was a negative attack on the Fellow Servant Rule which had been applied by this Court as an effective defense—*Quebec* v. *Merchant,* 133 U. S. 375; *Osceola,* 189 U. S. 158. However, this court in *Chelentis*

v. *Luckenbach* decided that the Fellow Servant Rule never had been part of the Maritime Law; that that law was based on a *warranty of seaworthiness of the vessel* and the obligation of the owner to furnish maintenance and cure, the origin of which was the ancient maritime code of the Phoenicians (*Reed* v. *Canfield,* 20 Fed. Case 426—No. 11641).

From his statement in the United States Senate, Cong. Record 73rd Congress, First Session (*supra*), page 66, 15859-12506, but beginning on page 65, I conclude that Mr. Justice Sutherland was under the impression that Section 20 would be effective. At any rate, this Court eventually made the Jones Act effective as to the owner's liability for negligent acts of co-servants and established the seaman's right to an election to have a jury trial. (*Johnson* v. *Panama, supra.*)

Justice Cardozo, in *Cortez* v. *Bull,* 287 U. S. 370, harmonizes the cause of action growing out of the obligation to furnish care with the right to a trial by jury under the Jones Act. The cause of action upon which the jury based its verdict for Sonnesen arose out of his employment on this vessel (Petitioner's brief; p. 6), *i. e.,* neglect to treat (p. 7). The judgment was for both Maintenance and Cure, Six Thousand ($6,000) Dollars, and for damages resulting from neglect to treat (p. 4, Petitioner's brief) Fifteeen Thousand ($15,000) Dollars.

From the record herein (p. 3, Petitioner's brief) it appears that the respondent herein, with an office and place of business within the jurisdiction of the United States, was operating as a subsidiary of the Standard Oil Company of New Jersey, at the time the cause of action herein arose. The Standard Oil Company of New Jersey similarly operated the "Wabasha" (*Low Ling Sing* v. *Standard Transportation Co.*), 274 Fed. 1017, 1921. Judge Learned Hand, who dissented in the *Kyriakos* case, 151 Fed. 2d 132, had no difficulty in 1921 in construing the Seamen's Act

and its purposes to equalize the operating costs of foreign and American competing vessels, page 1018:

> "The bill was under discussion before Congress and the country three years before the majority and minority (certainly the minority) of the Committee on Merchant Marine in their reports of May 1912, report 645, 62d Cong. 2nd Session, appeared to assume that the Section in this respect was unchanged."

The Seamen's Act is based on three main features. First, abolition of serfdom,—arrest for desertion; second, safety of crew and passengers; third, equalization of operating costs to discourage owners from putting their money in foreign bottoms to the disadvantage of American Merchant Marine. While the Act was pending (1913), Senator La Follette, page 48 Cong. Record (*supra*), 15859-12506, said:

> "I will read just a portion of a paragraph; it is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement."

The Seamen's Act did direct the President to abrogate all commercial treaties between the United States and foreign nations. The general purpose of the Seamen's Act and the means by which it was accomplished are explained in Merchant Seamen's Law, Darwin Press, New Bedford, Mass., pages 29-44, and the Jones Act pages 45 to 72.

The equalization feature of the Seamen's Act is expressed in U. S. Code Annot. 597 R. S. 4530, Dec. 21, 1898, as amended March 4, 1915, Chapter 153, Section 4, 38 stat. 1165:

> "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of

the vessel to which he belongs, one-half part of the balance of his wages earned and unpaid at the time when such demand is made at every port where such vessel after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided such a demand shall not be made before the expiration of, nor oftener than once in five days, nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. And when the voyage is ended, every such seamen shall be entitled to the remainder of the wages which shall be due him as provided in the preceding section: Provided further, That notwithstanding any release signed by any seamen under Section 644, any court having jurisdiction, may upon good cause shown, set aside such release and take such action as justice requires; And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

There was careful consideration by Congress and serious opposition to the passage of the Seamen's Act; for instance, Senator Lane (Congressional Record, Sixty-Third Congress, First Session, p. 61) said (15859-12506)

"* * * I do have an idea, however, that if we do not guard this measure well, we will become involved in international disputes. I think that it is a matter of great importance that we should do nothing which we are not justly entitled to do in our general business and friendly relations with other nations * * *."

Mr. Senator Burton of Ohio, on page 56 of the Congressional Record, quoted from a decision of Chief Justice Waite of this Court, Congressional Record, Sixty-third Congress, First Session, p. 56, and it would appear that the provision to abrogate treaties as part of passing the Act, was due to Senator Burton' argument.

The Court of Appeals of New York, however, has ignored in its decision all that has happened since 1915. They have treated this case as though the equalization policy of the LaFollette Seaman's Act had not been preceded by the abrogation of treaties that had previously given Consuls exclusive jurisdiction over matters involving the rights of mariners which related to the *internal regime* of the vessel, such as *wages,* maintenance *and cure, damages* for *neglect to treat,* and *personal injuries* on board vessel that occurred while within the territorial jurisdiction of the United States.

In *Uravich* v. *Jarka,* 282 U. S. 234, this Court did not hesitate to enforce the Jones Act as to longshoremen. Mr. Justice Holmes, speaking for this Court, held that *they* were "seamen", the loading and discharging of the vessel being part of the work of the mariner. (*Haverty,* 272 U. S. 50.)

Judge Learned Hand, who failed to concur in *Kyriakos* (*supra*), decided from the bench in 1924, a case in which the facts were on all fours with the facts in this case. He denied the motion of the shipowners' lawyer, Mr. Jones of counsel for the *respondent* here, to dismiss an action at law under the Jones Act.

The case was *Stewart* v. *Pacific Navigation Company,* 1924 AMC. 1272—3 Fed. (2) 329. Judge Hand said that only one point is *raised on this motion*—to set aside *the service of* the summons, and that under Section 20 of the Act of March 4, 1915, commonly called the Jones Act, "no

action can be brought against a foreign corporation", but he disposes of this point adversely to the respondent. Although cited to the Circuit Court of Appeals since then, as in other cases, *The Paula,* 91 F. (2) 1001, and *O'Neil* AMC. 1947, 505, this Stewart decision has been ignored. Because we believe Judge Hand then correctly stated the law and no court since then has effectively done so, I quote the decision in full:

> "Only one point is raised on this motion to set aside the service of the summons, and that is, that under 20 of the Act of March 4, 1915, commonly called the Jones Act, no action can be brought against a foreign corporation. This position is taken not because of an intimation in the general language which creates the right of action, for which the section concludes, which reads as follows 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides, or in which his principal office is located.' The Supreme Court in the case of The Allianca, Panama R. R. v. Johnson, 1924 A. M. C. 551, said very aptly that this sentence was not happily worded and the infelicity of the language causes the question in this case, as well as in that. In the case I have just cited, the sentence is construed as obviously it must be construed, not as a question of the affirmative bestowal of jurisdiction, but merely as a question of venue, and I must therefore, construe it in the same sense here. The general bestowal of jurisdiction is to be found in the right sentence, the long one; it lays down what the right shall be and against whom it shall exist. As I have already said, this language is general; *there is no indication of any purpose to limit it to U. S. Corporations,* and it would be highly unreasonable to impute any such purpose to Congress, for the result would be not only to deprive American seamen of the protection which the Act was meant to give

them when serving on foreign ships, but to *give advantage to such ships as against American ships.* We all know that the purpose of Congress is directly the opposite. That being very clear, the main purpose of the Act, how am I to interpret the last sentence, which confers jurisdiction. It seems to me that this would be very easy in the case of a foreign corporation. The phrase 'in which its principal office is located' clearly means in which the principal office of the foreign steamship company is located within the United States. There alone the action can be brought and if the section intends to cover foreign corporations, for the reasons I have given, there alone the action will lie. To my mind it is no strain on that language to interpret it in the way which I suggest. The Principal office of a foreign corporation will normally mean the principal office where it does its business in the United States. It may be, and it might be in this case, that the defendant did too little to justify assumption of jurisdiction at all. A certain amount of business must be carried on within the United States in order to get any person jurisdiction, and that is the imputation which this statute carries along with the others. But no such point is raised in the case at bar. It is conceded that so far as the defendant goes, it subjects itself personally to jurisdiction if that is what the section means; that being the case, I am satisfied that in this case it means what I have said.

Therefore the motion will be denied." (Italics ours.)

At the time of the 1924 Jones Act decision *Stewart* v. *Pacific supra,* which I maintain is correct, Judge Learned Hand had reviewed only three years earlier the equalization wage cases of the Seamen's Act. Lo Ling Sing 274 Fed. 1017-1018. Though Judge Hand cited the Circuit Court of Appeals (Fifth Circuit) decision in the Strathearn case (239 Fed. 583) this court (Mr. George Suther-

land being of counsel for the seamen), had sustained that decision on March 29, 1920, *Dillon* v. *Strathearn*, 252 U. S. 348.

Justice Day, for a unanimous court in that case said at page 354:

> "The language applies to *all seamen* on vessels of the United States and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States * * *
>
> "It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed 'to promote the welfare of American seamen in the merchant marine of the United States.' But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." (Italics ours.)

When the Seamen's Act was passed wages on American vessels were about $40 a month for able seamen, British and other foreign vessels, mostly tramps, $20 or four pounds ten shillings. By 1917 two years after the passage of the Seamen's Act and one year after its enforcement (treaty abrogation) British and foreign real wages by reason of the Half Wage Law and abolition of arrest for desertion (and collective bargaining in England at least) had risen to a parity with American wages, American able seamen $85, British able seamen 15 pounds ten shillings.

During the recent war American able seamen's wages have risen to $225 a month. The British and foreign sea-

men are about $125 a month. For about fifty years there has been in existence an international labor organization known as the International Transportworkers' Federation, main office Maritime House, Oldtown Clapham, London, S. W. 4, England, New York office 5 Beekman Street, New York 7, N. Y. (This organization is opposed to International federation dominated by the Russian Soviet so-called labor unions.) From its May 13th report, Vol. 9 No. 8 Page 1, I quote:

> *"U. S. Ships Carry 43% of E. C. A. Cargoes*
>
> (ITF) The National Federation of American Shipping, Inc. declared on March 23rd that only 43% of the Aggregate ECA cargoes was carried by United States flag ships in January and February as shown by the reports of the Economic Cooperation Administration. Of these 43%, about 10% was shipped in Army owned vessels and only 33% in Commercial vessels.
>
> The Federation declared that despite the requirements that 50% of the over-all cargo should have abroad in American ships only a small percentage of ECA cargoes has been shipped on United States vessels. From April 1948 to February 1949 the United Kingdom shipped 17.6% of ECA cargoes from the U. S. on U. S. Flag vessels, the Netherlands 29.8%, Denmark 17.7% and Norway 30.7%."

Our press of course has contained many reports lately showing the moving of freight from high wage and insurance American vessels to low wage and insurance foreign vessels. In the Master, Mate & Pilot (Publ. AFL) May 1949, page 11 is an article entitled "World Boycott of Panamanian Vessels Planned at AFL Meeting in New York." From this article I quote:

> "It was the unanimous consensus that this boycott action must be taken, because already there are ap-

> proximately three million tons of shipping flying the Panamanian flag for the purpose of evasion of taxation, safety regulations, and social and labor standards. Legitimate Panamanian flag ships owned and operated by Panamanian citizens for the interest of Panamanian commerce will not be affected by this boycott."

According to this article delegates from American seamen's unions and longshore unions are at this very moment in attendance at a conference on this Boycott Plan in London.

In the passing of the Seamen's Act one of the most effective arguments to members of Congress was, as often quoted in the language of Andrew Furuseth and restated by late Justice Sutherland when a U. S. Senator (Page 66 of Congressional Record 15859-12506):

> "The Caucasian is leaving the sea; the Oriental is filling the vacancy. Seapower is in the seamen; vessels are the seamen's working tools; tools become the property of those who handle them. This is not a prophesy it is a fact. If the reader needs proof let him visit the docks where the ocean cargo carrier, the tramp is taking in or delivering a cargo etc."

This was read by Senator Sutherland in the United States Senate in October 1931 page 66 *supra*. After the writ herein is granted, it may be that we will have to have more Federal Judges to hear and dispose of the many cases that will be brought up in order to enforce the Maritime Safety Laws of the U. S. against foreign vessels as a condition of entry, but that is a difficulty that can be remedied and it will give employment to many lawyers who are well qualified to bring democratic government to the seamen and the people.

Compensation acts do not create safe conditions. As Andrew Furuseth explained in a document filed in support

of Senate Bill 1080 reprinted in Symposium on Andrew Furuseth at Darwin Press, New Bedford, Mass., Page 161—also Merchant Seamen's Law, Page 76. Here Mr. Furuseth shows how The Jones Act makes negligent ship operation unprofitable and the careful operator who provides his vessel with modern machinery and an adequate number of skilled seamen and maintains it in that condition saves money. My own thought is that the public as evidenced by recent reports of the National Safety Council could not lose by elective "Jones Acts" in every state of the U. S. Compensation acts do not discourage accidents and they do not even maintain the widows and cripples who become in part at least public charges. Captain Albert E. Oliver one of the directors of the Friends of Andrew Furuseth Legislative Association in a speech made March 12, 1949 on the occasion of the 95th birthday of Andrew Furuseth said—"We are now confronted with a menace to our merchant marine * * *". If our courts had enforced the Seamen's Act particularly as to the amendment of Section 20, I wonder whether it would have been profitable for ship-owners to transfer hundreds of merchant vessels to the flag of Panamania.

Not only is the public interested in the cost of maintaining the subsidy payments to American shipowners to make up the difference between the operating cost of foreign and American vessels, but our hospitals are filled with seamen suffering from tuberculosis and other diseases and injuries which they acquired while employed on Panamanian and Honduras vessels. The case of Ramon Espanoza on the "Ivy G", a Panamanian vessel formerly a liberty ship owned by Orian Steamship Co., was burned while acting as second cook on the 1st of January, 1948. After being treated in a hospital in Antwerp for a few weeks he was returned to the United States. He entered the U. S. Marine Hospital where it was discovered that he had tuberculosis and had been a patient for months.

While that suit was pending (and it still is pending) it was discovered that he had acquired the tuberculosis on another vessel, the "Aris", another Panamanian vessel, and the physician who examined him for the company at the end of the voyage to avoid expenses did not report the condition. Consequently he made the trip on the "Ivy G" and when he was in the hospital the doctors discovered that he had a cavity in one of his lungs. I dare say that there are dozens of such cases of seamen receiving treatment in public hospitals in this city, right now. Espanoza is now receiving treatment at Bellevue and Seaview Hospital and if the decision of the Court of Appeals in the case at bar is to stand not only will our merchant shipping all move to cheaper bottoms and we will have none of our own except what we pay for entirely at government expense but we will continue to have to pay as tax payers the cost of care and cure of hundreds of seamen who are disabled on vessels owned by companies, who as Captain Oliver says evade payment of tonnage taxes, income taxes, disregard our safety laws and abandon their neglected mariners.

Having placed these true facts before this court I hopefully expect the granting of a writ of certiorari.

Respectfully submitted,

FRIENDS OF
ANDREW FURUSETH
LEGISLATIVE ASSOCIATION.

SILAS B. AXTELL.